KONG MING FINANCE CORPORATION

v.

LEE SHIN KOON

HIGH COURT, SIBU
TUAN STEVE L.K. SHIM J.
[SUIT NO. 20 OF 1991]
6 SEPTEMBER 1993

LIMITATION: Claim for repayment of loan charged upon immovable property - Claim made ten years after loan had fallen due - Whether claim statute barred - Whether applicable period of limitation six years or twelve years - Limitation Ordinance (Cap. 49) - Arts. 38,40,94,101.

CONTRACT: Construction of agreement - Whether Memorandum of Charge a simple agreement or a specialty contract - Effect of distinction thereof on limitation period.

The plaintiff granted a loan for RM 250,000 to one Lee & Associates (the Borrower). As security for the said loan a Memorandum of Charge was executed by the defendant on 12 November 1981 wherein two parcels of land were put to the charge of the plaintiff. The Borrower defaulted in payment of 23 instalments and by a letter of demand dated 26 January 1984 the plaintiff demanded from the defendant payment of the principal sum together with interest thereon totalling RM322,338.01. The defendant failed to pay as demanded but did manage to pay the plaintiff RM 250,000 through the sale of the two pieces of land specified in the Memorandum of Charge. However, as at 31 May 1991, there was still an outstanding balance of RM 306,519 consisting of the unpaid principal and the accumulated interests owed by the defendant to the plaintiff. By a writ of summons dated 25 June 1991, the plaintiff commenced action to recover the outstanding sum from the defendant. Subsequently a summary judgement in respect of the claim was obtained by the plaintiff through an application to the Senior Assistant Registrar and the defendant appealed against the said order.

The defendant pleaded limitation and said that the plaintiff's claim was statute barred under articles 38 and/or 40 read with article 94 of the Schedule to the Limitation Ordinance (Cap. 49). In support of this contention the defendant argued that since the plaintiff's claim was for money lent under a written agreement, namely, the Memorandum of Charge, the relevant period of limitation was six years commencing from the day the loan was made and as the plaintiff commenced action only on 25 June 1991, almost ten years to the date the Memorandum of Charge was executed, the claim was therefore statute barred.

Held:

[1] On the totality of the evidence as disclosed by the affidavits, the defendant has failed to satisfy the court that there is any triable issue or question or that there ought to be a trial for some other reason. This is a plain case which ought not to go to trial for want of arguable issues.

[2] Articles 38 or 40 of the Schedule to the Limitation Ordinance (Cap.49), whether by themselves or read in conjunction with article 94, are inapplicable in the circumstances of this case. Article 38 is inapplicable because it is only confined to oral and unwritten contracts and article 40 is irrelevant because unlike the Memorandum of Charge in this case, it relates to suits for money lent under an agreement that it shall be payable on demand. On the other hand, article 94 more appropriately covers suits in respect of simple loan contracts rather than to specialty contracts or contracts made under seal as the present case undoubtedly is.

[3] The present case is an action to enforce payment of money charged upon immovable property. This being the case it falls squarely within the confines of Article 101 of the Schedule to the Limitation Ordinance (Cap. 49) where the period of limitation is twelve years from the time when the money sued becomes due.

[Judgement entered for the plaintiff. Appeal of defendant dismissed].

Case referred to:
Evans v. Bartlam [1937] AC 473

Legislation referred to:
Limitation Ordinance (Cap. 49)
Rules of the High Court 1980, O. 14 r. 1

Other sources referred to:
Halsbury's Laws of England, 4th Edn., Vol. 28, p. 297
Supreme Court Practice 1991, Vol. 1, p. 873, paragraph 58/1/2

For the plaintiff - George Lau; Wong Ho Leng & Co.
For the defendant - Tai Choi Yu; M/s. Tai Choi Yu & Co.

JUDGMENT

Steve L.K. Shim J:

By summons in chambers, the plaintiff had applied to the Senior Assistant Registrar under O. 14 r. 1 Rules of the High Court for judgment to be entered against the defendant for *inter alia:*

(a) the sum of RM306,519 with interest thereon at the rate of 16% per annum from 1 June 1991 until full payment and
(b) further and or in the alternative, that the amended defence and counterclaim of the defendant be struck out and judgment be entered for the said sum and interest.

Upon the conclusion of the hearing of the application, the Senior Assistant Registrar ordered that judgment be entered against the defendant for the sum and interest prayed for by the plaintiff. He also ordered the counterclaim of the defendant be struck out. It is against that decision that the defendant has now appealed.

At the outset it must be noted that such an appeal is to be dealt with by way of an actual rehearing of the application and the Judge will treat the matter as though it comes before him for the first time. Nevertheless, the Judge should give whatever weight it deserves to the decision of the Senior Assistant Registrar although he is in no way bound by it: See **Supreme Court Practice 1991,** Vol. 1, p. 873, paragraph 58/1/2; *Evans v. Bartlam* [1937] AC 473.

The plaintiff's case in so far as can be disclosed in the supporting affidavits is essentially as follows:

That the defendant was at all material times the registered proprietor of 2 parcels of land, one situate at the 1st milestone, Lutong - Kuala Baram Road, Miri, containing an area of 1.0886 hectares, more or less and described as lot 1089 Kuala Baram Land District and the other situate at Jee Foh Road, Krokop, Miri, containing an area of 934.4 square metres more or less and described as lot 334 Block 5 Miri Concession Land District (hereinafter referred to as the said lands); that in consideration for the sum of RM250,000 being lent or advanced to Lee & Associates of Room 103, Moh Heng Building, Miri, by the plaintiff, the defendant executed a Memorandum of Charge dated 12 November 1981 in favour of the plaintiff and this was duly registered at the Miri Land Registry as Instrument No. L. 312/1982 on 31 January 1982; that upon default in the payment of 23 instalments, the plaintiff, pursuant to the conditions in the Memorandum of Charge aforesaid, demanded from the defendant payment of the principal sum of RM209,090.17 and interest of RM113,247.84 totalling RM322,338.01; that upon the failure of the defendant to pay as demanded, the plaintiff took out an originating summons for the said lands to be sold by public auction; that subsequently by a Court order dated 6 July 1987, the said lands were ordered to be sold by public auction to satisfy the amount of RM322,338.01 as at 31 May 1984. It is to be noted that the Court order also directed that there be interest thereon at 16% per annum on the principal sum of RM209,090.17 from 1 June 1984 until full payment. After several abortive public auction sales, the plaintiff agreed to the defendant's request to sell the said lands by private treaty for the sum of RM250,000 to one Chan Poh Ann. After the sale was effected, the proceeds of RM250,000 were paid to the plaintiff. However, as at 31 May 1991, there was still an outstanding balance of RM306,519 owed by the defendant to the plaintiff which it now claims.

In resisting the application, the defendant has filed an affidavit in opposition affirmed on 30 July 1992 propagating various courses of defence but I think essentially the main thrust of the defendant's case is clearly discernible from the proposed intended amended defence and counterclaim exhibit LSK1 and in the submission of Mr. Tai, Counsel for the defendant namely, that the plaintiff's claim is statute barred under articles 38 and/or 40 read with article 94 of the Schedule to the Limitation Ordinance (Cap. 49). It is the defendant's case that since the plaintiff's claim is for money lent under a written agreement, namely, the Memorandum of Charge exhibit PLSK1, the relevant period of limitation is 6 years commencing from the day the loan was made and as the plaintiff commenced action on 25 June 1991 the claim is therefore statute barred and consequently the defendant can no longer be regarded as indebted to the plaintiff in this case. It may perhaps be pointed out that in the unamended defence dated 30 July 1991 and filed on 1 August 1991, the defendant had pleaded that the 6 year period began to run from the letter of demand made on 26 January 1984. Mr. Lau, Counsel for the plaintiff has questioned this material change

in defence which he says, in the absence of any explanation provided in the defendant's affidavits, must be treated as a sham. To this Mr. Tai has responded by stating that the original unamended defence was infact prepared by the defendant himself without the benefit of legal advice and hence when he took over as the defendant's Counsel, he found it appropriate to amend the defence along the lines in the proposed intended amended defence and counterclaim, exhibit LSK1.

Here, I think the terms and conditions in the Memorandum of Charge exhibit PLSK1 are significant. They are quite brief and straightforward. As I have stated, it is a document executed by the defendant in favour of the plaintiff in consideration for money lent or advanced by the latter to the former amounting to RM250,000. It is a kind of specialty contract since the Memorandum of Charge exhibit PLSK1 has been registered at Miri Land Registry as Instrument No. L.312/1982: see **Halsbury's Laws of England,** 4th Edn., Vol. 28 p. 297. It seems clear that in the instant case, the sum of RM306,519, subject matter of the plaintiff's claim is, to all intents and purposes, inextricably linked to the loan advanced by the plaintiff to the defendant upon the terms and conditions in exhibit PLSK1 executed between the parties even though this sum of RM306,519 may be the product of accumulating interest over the years. The plaintiff's claim for the principal sum and interest thereon is based on the Memorandum of Charge exhibit PLSK1. The present case is therefore an action to enforce payment of money charged upon immovable property. It falls squarely within the confines of article 101 of the Schedule to the Limitation Ordinance (Cap. 49) where the period of limitation is 12 years from the time when the money sued becomes due.

Now, Mr. Tai has submitted that the relevant or applicable articles should be articles 38 and or 40 read with article 94 of the Schedule. According to him, various interpretations could be placed on the clause in the Memorandum of Charge exhibit PLSK1 which states that the defendant "do hereby promise to repay the same without demand by 48 monthly instalments" and that these words could be construed to mean that the loan in question was payable on demand by instalment on the particular day, that is, the 12th day of each calender month. He however concedes that article 38 is confined to oral or unwritten contracts. If so I do not see how it can be applicable to this case nor do I think article 40 relevant here because it relates to suits for money lent under an agreement that it shall be payable on demand. Mr. Tai has then attempted to marshall in article 94 maintaining that it has a sweeping effect covering all written contracts. In my view, article 94 more appropriately covers suits in respect of simple loan contracts rather than to what I have earlier referred to as specialty contracts or contracts made under seal as the present case undoubtedly is. That being the position, I hold that articles 38 and or 40, whether by themselves or in conjunction with article 94, are inapplicable in the circumstances of this case. I am of the view and I hold that the applicable article in the instant case is article 101 which provides for a limitation period of 12 years commencing from the time the money sued becomes due. Generally the commencement should be the moment when the principal sum becomes due. However, if there had been any instalment payments, then the starting point would be from the last of such instalment payments. The present case falls under this category. In the circumstances it is necessary to determine the date of the last instalment payment. On this issue, paragraph 9 of the supporting affidavit of Mr. Patrick Lau Sie Kong, the assistant manager of the plaintiff provides some clue. It states:

> Upon default made by the defendant in the payment of the 23 instalments under the said Memorandum of Charge the plaintiff demanded payment from the defendant of the principal sum of RM209,090.17 and the interest of RM113,247.84 totalling RM322,338.01 as at 31 May 1984.

The above statement is however not entirely clear and Mr. Lau's submission in this regard has not been of much help either but it would seem that the commencement date relied upon is 31 May 1984). On this same issue, the defendant has also been vacillating. For example, in his unamended defence, he alleged that the commencement date was 26 January 1984 which was the date of the letter of demand issued to him by the plaintiff but in the proposed intended amended defence and counterclaim exhibit LSK1 the defendant appeared to have shifted his stand by alleging it was on 12 October 1984 as reflected in paragraph 3.1 therein and this has been endorsed by Mr. Tai in his submission before me. Thus, on the affidavits both in support of and in opposition to the application,

there is no clear and consistent evidence as to the exact date of the last instalment payment made by the defendant to the plaintiff. In any event, whichever the date, whether it be on 31 May 1984 as alleged by the plaintiff or on 26 January 1984 or 12 October 1981 as propagated by the defendant, the plaintiff could not be regarded as having gone beyond the limitation period of 12 years since, on the undisputed fact, it actually commenced suit against the defendant on 25 June 1991 as reflected in the writ of summons of the same date.

The defendant has also raised certain ancillary defences such as fraud, unlawful interference with contractual relations, breach of collateral contract, illegality of contract, negligence, etc. I do not find it necessary to go into any detail consideration on these issues; suffice it to say that having considered them with care, they contain no merit whatsoever. As regards the pleas raised in the counterclaim, I find them to be similar in substance and effect to the issues raised in the substantive defence. They are unsustainable on the merits.

For the reasons given and on the totality of the evidence as disclosed by the affidavits, I find the defendant has failed to satisfy the Court that there is any triable issue or question or that there ought to be a trial for some other reason. In my view, no arguable issue has been raised. It is a plain case which ought not to go to trial. In the circumstances, judgment in the sum of RM306,519 with interest thereon at the rate of 16% per annum until full payment should be entered for the plaintiff against the defendant. Accordingly, I will dismiss this appeal with cost.

LIM SUNG HUAK & 9 ORS.

v.

SYARIKAT PEMAJU TANAH TIKAM BATU SDN. BHD.

HIGH COURT, ALOR SETAR
DATO' K.C. VOHRAH J.
[CIVIL SUIT NO. 23-104-1992]
15 JULY 1993

INJUNCTION: Application by defendant to set aside injunction - Non-disclosure of full and true facts by plaintiff - Statement of claim and affidavits contained misleading averments - Whether misleading averments and non-disclosure constituted sufficient grounds for discharge of injunction.

This was an application by the defendant to set aside an injunction obtained by the plaintiffs restraining the defendant from dealing with two lots of land one of which was registered in the name of the defendant. In the statement of claim the plaintiffs averred that all of them bought portions of the said land from the defendant. This averment was unfounded and untrue as in actual fact only the 7th plaintiff had ever bought a portion of the said land from the defendant. In the affidavit of the 1st plaintiff, sworn in support the application for the injunction, the same misleading statement was also averred. The facts further showed that except for the 8th plaintiff, all the other plaintiffs had purchased some portions of the said land from another firm but these purchases were not disclosed by the plaintiffs either in their affidavits or pleadings.

The issue before the court was whether the misleading statements and non-disclosure of facts constituted sufficient grounds for setting the injunction aside.

Held:
The misleading averments in both the statement of claim and the affidavit supporting the application for the injunction would be sufficient grounds to justify the discharge of the injunction.

[Application allowed].

Cases referred to:
R v. Kensington Income Tax Commissioners [1917] 1 KB 486 ***(refd)***
Boyce v. Gill [1891] 64 L J 824 ***(refd)***